IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.1063 SB OF 2001

DATE OF DECISION: AUGUST 20, 2007

Baldev Singh and others

.....Appellants

VERSUS

State of Punjab

....Respondent

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. H. R. Nahoria, Advocate,
for the appellants.

Mr. Shailesh Gupta, DAG, Punjab,
for the State.

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RANJIT SINGH, J.

While on patrolling duty in the area of Village Upodi, Manak Majra, SHO/SI Sampuran Singh posted at PS Sadar, Malerkotla, happened to intercepted a Truck No.HR-29A-4765, which was driven by one of the appellants, Baldev Singh. Appellant Kewal Krishan and Karamjit Singh were allegedly sitting on tool box, when the truck was stopped. May sound a bit strange, but it is disclosed that this happened in the presence of DSP Jagjit Singh, who had come to the site and was present with the police party. The truck was covered with tarpaulin. On the basis of suspicion, the tarpaulin was removed and on a search, three gunny bags containing poppy husk were recovered from the tool box. This is how the three appellants came to booked under the Narcotic Drugs and Psychotropic Substances Act, charged and

prosecuted, leading conviction and sentence of 10 years rigorous imprisonment to each and a fine of Rs.1,00,000/- to each of the appellant. Each appellant was also to undergo RI for one year in default of payment of fine.

The instant appeal is filed by three appellants, namely, Baldev Singh, Kewal Krishan and Karamjit Singh. In addition, appellant Kewal Krishan also filed Criminal Appeal No.1436 SB of 2001, impugning the same order of his conviction separately, through another counsel, Mr.B.S.Bhasaur. Noticing this position, this Court, on 3.5.2006, disposed of said Criminal Appeal as infructuous on the ground that appellant Kewal Krishan has already filed the present appeal earlier alongwith his co-appellants.

As is revealed from the record, the truck driven by appellant Baldev Singh, and occupied by his co-appellants, Kewal Krishan and Karamjit Singh, in fact was carrying 900 boxes of whisky from Gujarat to Jalandhar and was intercepted, leading to alleged recovery of bags. Two samples weighing 250 grams from each of the 3 gunny bags statedly recovered from the truck were drawn and converted into separate parcels. On weighment, the remaining quantity of poppy husk was found to be 35.500 Kgs. in each bag. The samples and the bags containing poppy husk were sealed by SI Sampuran Singh with the seal of D.S.P. bearing impression `JS'. Statedly, the seal after use and on preparation of sample seal Ex.P1 was returned to DSP Jagjit Singh. 900 boxes of whisky were also taken into possession alongwith permit and invoice, vide memo Ex.PB, which was attested by ASI Devi Raj. The truck was also taken into possession vide recovery memo Ex.PA duly attested by the

police witnesses present. Amounts of Rs.350/- and Rs.100/- were recovered from appellants Baldev Singh and Kewal Krishan on their personal search whereas nothing was recovered from the personal search of appellant, Karamjit Singh. The appellants were accordingly arrested. SI Sampuran Singh deposited the case property with MHC Gurmej Singh with seals intact. The samples were sent to the Chemical Examiner, who issued report Ex.PJ. On completion of investigation, challan was presented, followed by trial, conviction and sentence.

The appellants, when confronted with the incriminating evidence and circumstances, pleaded their false implication at the instance of ASI Dev Raj Singh. The appellants not only denied the evidence of recovery and other incriminating evidence but stated in the defence that they were transporting 900 boxes of whisky from Puna to Jalandhar. As per defence, in the area of Malerkotla, the truck of the appellants was stopped by ASI Dev Raj at Bus Stand of Village Sangla on Dhuri Malerkotla road. ASI Dev Raj demanded some boxes of whisky from them and on their refusal, he involved the appellants in the present false case. All the three appellants further claimed that nothing was recovered from them but they were taken to Police Station, Malerkotla, where the entire record in regard to recovery etc. was fabricated by the police while in the Police Station. In defence, they also produced on record copy of the report under Section 173 Cr.P.C., Ex.DA and closed their defence. The prosecution case is supported by the evidence of DSP Jagjit Singh (PW1), Head Constable Gurmel Singh (PW2), SI Sampuran Singh (PW3) and Constable Major Singh (PW4).

Mr.H.R.Nahoria, learned counsel appearing for the appellants, has impugned the findings of the trial Court on number of grounds. He would first urge that the recovery was during day time and at a public place where large number of witnesses were present but still no independent witness was joined by the police. He would, thus, say that it is not safe to rely upon the evidence given by police witnesses in the background of the defence taken by the appellants, alleging their false implication at the instance of ASI Dev Raj. In this regard, the counsel has placed reliance on the case of ***State of Punjab Vs. Jalaur Singh,*** 2002 (3) RCR 478, ***Fateh Singh Vs. State of Haryana,*** 2006 (2) RCR 762 and ***Maan Singh Vs. State of Haryana,*** 2006(1) RCR (Criminal) 335.

The counsel next contends that the seal after use was concededly given to the DSP, a police officer, and not to any independent witness. This in itself, according to the counsel, would be enough to create doubt in the prosecution story and would call for interference in the finding. In support of this submission, the counsel has again made reference to the case of Maan Singh (supra). He would then contend that Investigating Officer in this case was also the complainant and he, as such, could not have competently investigated the complaint. He would again refer to Maan Singh's case (supra) in support of this limb of his argument. Further grouse is that samples in this case were sent after 11 days, which would again go to cast doubt on the prosecution case, especially so when the link evidence in this case is full of infirmities. In this regard, the counsel points out that only one sample was sent for examination

without leading any evidence to show that these samples were from which bag. It is further urged that no question was addressed to the appellants in regard to they being in conscious possession of the contraband and in fact would proceed to urge that the incriminating circumstances in this regard or otherwise were not put to the appellants in any manner to enable them to explain or rebut the presumption, if any, regarding conscious possession of the contraband.

Learned State counsel, on the other hand, would point out that all these aspects were duly considered by the trial Court and dealt with and as such, would plead that no interference in appeal is called for.

It is not a matter of serious dispute that recovery in this case was in a broad day light at a public thorough fare accessible to number of independent persons. Record shows that recovery in this case was effected in the presence of official police witnesses and no efforts were made to join any independent witness at the time of recovery. This may lend credence to the plausible explanation given by the appellants that they have been falsely implicated at the instance of ASI Dev Raj, who had demanded some cases of whisky, which they refused, leading to registration of the case. An absence of any independent witness may tend to indicate that the plea of defence that all these proceedings were held at the Police Station can not be easily discounted. Even otherwise, non-joining of any independent witness, if this can be ensured, has always been viewed with suspicion. In the case of Jalaur Singh (supra), the accused was acquitted, giving benefit of doubt on the ground that no independent

witness was joined, though available and recovery of poppy husk being at a thorough fare. In Fateh Singh's case (supra), one of the grounds for acquitting the accused was non-joining of independent witnesses, when the recovery was at a thorough fare. Again in Maan Singh's case (supra), one of the ground while acquitting the accused was non-joining of any independent witness, when the recovery was on the main road during day time. This aspect of the case, in my view, has not received proper appreciation by the trial Court. It may be true, as observed by the trial Court, that the case of the prosecution can not be thrown out on this ground alone but the same is required to be considered in the background of the facts and circumstances in each case. The prosecution can be expected to explain non-joining of independent witnesses. If such witnesses are available, then they should be joined and if not done, then it needs to be explained so as to remove any doubt in regard to false implication, as made in the present case. In this case, the prosecution has not given any explanation in this regard and as such, this may be required to be viewed with suspicion. It is not without reason that in the cases of Jalaur Singh, Fateh Singh and Maan Singh (supra), the accused/appellants therein were acquitted on the abovesaid grounds. The ratio laid down in these decisions are clearly applicable to the present case and would cast a doubt on the story of the prosecution with resultant benefit accruing to the appellants.

The effect of this aspect can further be appreciated when one would notice that in this case the seal was handed over to DSP. It was mainly because of absence of any independent witness. This would rather create another infirmity in the case of prosecution. If the

seal of the samples remains in the custody of the investigating agency, the prosecution certainly would not be in a position to rule out the possibility of tempering of the seal on the sample and the contraband recovered and resultant tempering of the samples as such. It is in this context that the seal is required to be handed over to some independent person so that the criticism of this nature is avoided and possibility of tempering ruled out. This action was one of the consideration in Maan Singh's case (supra), leading to acquittal of the accused therein. Added to this is the fact that the samples in this case were sent for analysis after 11 days of it being taken. Admittedly, the samples were drawn on 10.6.2004 whereas these were sent to Chemical Examiner on 21.6.2004. On this aspect, the counsel has referred to the case of ***Gian Singh Vs. State of Punjab,*** 2006 (2) RCR (Criminal) 611. In this case also, the samples were sent to Chemical Examiner after 14 days and the seal had remained with the Investigating Officer. The conviction in this case was set-aside by holding that possibility of seal being tempered with and substance changed in the container or packet on being re-sealed could not be ruled out. On this aspect, reference can also be made to the Supreme Court judgment in ***Rajesh Jagdamba Avasthi Vs. State of Goa***, 2005 (1) RCR (Criminal) 406. Similarly, in the case of ***Bantapalli Durga Rao and others Vs. State of A.P.***, 2005 (4) RCR (Criminal) 404, the conviction was set-aside on the ground that delay in sending the sample for analysis was not explained. This delay would undoubtedly has effect on the prosecution and dent its case and benefit to the defence.

Though the infirmities as noticed above may have been enough to call for interference in the conviction of the appellants but if one could pursuade himself to ignore these, then still there is further very serious infirmities starring at the Court, which would compel it to interfere in the findings of the trial Court. The Investigating Officer in this case is the complainant and the one who had conducted the investigation. This objection of the defence is required to be appreciated in the background of their plea of false implication at the instance of ASI Dev Raj. Concededly, ASI Dev Raj is present at the time of said interception. He has not been examined as a witness. This obviously was to avoid exposing ASI Dev Raj from being questioned in regard to the false involvement of the appellants at his instance. He had otherwise attested Ex.PB, which would clearly show his presence at the time of this interception. This may be another factor to lend credence to the plea of the appellants raised in their defence concerning demand of whisky. It may be worth noticing that no allegation is made by the appellants against DSP or the S.H.O. but they have named ASI Dev Raj in this regard. In fact, this action of the Investigating Officer, being complainant as well, would add to the list of infirmities in the case of prosecution. The precedent in this regard again can be had in the case of Maan Singh (supra) where this was yet another ground in acquitting the accused persons therein. The counsel has also referred to ***Gurcharan Singh Vs. State of Punjab,*** 2005 (4) RCR 681 in support of this limb of his submission.

There is yet another infirmity, causing serious damage to

the case of prosecution. It is pointed out by the counsel that prosecution did not lead any evidence to prove that the appellants were in conscious possession of the contraband. A perusal of the evidence would show that the truck was intercepted, which was being driven by appellant, Baldev Singh. The co-appellants were found sitting on the tool box of the truck, from which these alleged 3 bags were recovered. The contention is that this is not enough to prove that the same were in the custody and control of the appellants. Added to this is a fact that no question was addressed to the appellants while being examined under Section 313 Cr.P.C. in regard to the contraband being in their conscious possession to enable them to offer this explanation in this regard. Perhaps, no question could be addressed to them, concerning case of prosecution as there is no such evidence led by the prosecution before the Court. In fact, the issue is conclusively decided by the Hon'ble Supreme court in the case of ***Avtar Singh Vs. State of Punjab,*** 2002 (4) RCR (Criminal) 180 and ***State of Punjab Vs. Balkar Singh and another*** 2004 Supreme Court Cases (Cri.) 838. In case of Avtar Singh (supra), 16 bags of poppy husk were recovered from a truck and two accused persons were found sitting on the bags and one accused was driving the truck. Their conviction was set-aside on the ground that it could not be proved that the accused had the custody and control of these bags. As noticed by the Hon'ble Supreme Court in this case, the word “possession” has different shades of meaning and it is quite elastic in its connotation. It is further observed that possession and ownership need not always go together by the minimum requisite

element, which has to be satisfied in custody or control over the goods. On the basis of evidence, it may be seen whether the appellants could be held to be in conscious possession of the contraband. Concededly, one of the appellants was driving the vehicle and 2 were sitting on the tool box and not on the bags. In Avtar Singh's case (supra), 2 persons were found sitting on the bags. It is rather difficult to reach a conclusion beyond reasonable doubt from these facts that the appellants were in conscious possession of the contraband. The possibility or probabilities can not be ruled out that one of them or somebody else could be custodian of the goods may or may not be the proprietor. The fact that a person was merely sitting on the tool box of the truck, in the absence of any further evidence in this regard, can not give rise to presumption that he was in possession of the goods. Not only that the prosecution did not lead proper evidence in this regard to show the conscious possession of the appellants over the contraband but they were not addressed any question to enable them to explain their conduct of sitting on the tool box or driving the vehicle. As observed by the Hon'ble Supreme Court in the case of Avtar Singh (supra), the object of examination under Section 313 Cr.P.C. is to afford an opportunity to the accused to explain the circumstances appearing in evidence against him. All the 3 appellants were addressed identical questions without realising that one of them was driving the vehicle whereas 2 were sitting on the tool box. No question was addressed to them about the possession of goods. This was a crucial aspect, about which they were needed to be questioned to explain their position. This failure is quite significant and under these circumstances can not even give

rise to raising any presumption against them under Section 114 of the Evidence Act. In the case of Balkar Singh (supra), 100 bags of poppy husk were recovered from a place where the accused persons were present. They were found sitting on the bags and could not give any satisfactory explanation for being present at that place. While deciding whether this was proof enough to show conscious possession of the prohibited substance, the Hon'ble Supreme Court held that merely by being found to be present at a place where the poppy husk bags were found and failure to give satisfactory explanation did not prove that the accused persons were in conscious possession of said bags of poppy husk. Almost similar is the position in the present case. It can, thus, be said that the prosecution did not lead sufficient evidence to show the conscious possession of the appellants over the contraband.

The prosecution also is in no position to explain as to why 3 samples were sent to FSL for examination whereas 2 samples were drawn from each of the 3 bags. Where did the remaining three samples go/vanish. There is also no evidence on record to show that these 3 samples sent to FSL were from 3 different bags. Thus, the possibility can not be ruled out that the samples sent to the FSL were from the same bag and not from these different bags. Prosecution can also not prove if 6 samples were drawn. If six samples were drawn, then where are the remaining three samples and why these were not sent for examination. This all is required to be appreciated in the background that seal in this case was with the DSP and had not been handed over to any independent witness. It can be alleged that these samples were re-drawn or re-sealed. There is no evidence

to show that these were the same samples, which were drawn by the police. This aspect again would put a serious question mark over the case of prosecution. These infirmities can not be over-looked. These would make the defence offered by the appellants sound probable, which will go to cast doubt on the whole prosecution case.

Taking the totality of the circumstances and the evidence into consideration and the infirmities that are noticed in the case of prosecution, I am not inclined to sustain the conviction of the appellants for an offence under the Narcotic Drugs and Psychotropic Substances Act. The procedural safeguards should always be considered in the context of the sweep of the powers. It is said that wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute. (See ***Ranjit Thakur Vs. Union of India and others,*** AIR 1987 SC 2386).

The appeal is accordingly allowed. The impugned judgment under appeal is set-aside and the appellants are acquitted of the charge and are relieved of the consequences of the trial. The bail bonds and surety bonds, if any furnished in the trial Court, shall stand discharged.

August 20, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**